BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD
OF THE STATE OF CALIFORNIA

ALVIN KLEIN, ROBERT LIPPMAN and STEVEN LIPPMAN dba Village Expressmart 10974 Le Conte Avenue Los Angeles, CA 90024, Appellants/Licensees.	) AB-7184
	) File 20-141764
	) Reg. 97041857
	) Administrative Law Judge at the Dept. Hearing: Jeffrey Fine
v.	) Date and Place of the Appeals Board Hearing: May 6, 1999 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	

Alvin Klein, Robert Lippman, and Steven Lippman, doing business as Village Expressmart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their off-sale beer and wine license for their clerk, Jose Ballesteros, having sold an alcoholic beverage (a twelve-pack of beer) to Aaronmichael Younessi, who was then 19 years of age, such sale being contrary to the universal and generic public welfare and morals provisions of the California

[1] The decision of the Department, dated July 2, 1998, is sest forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code section 25658, subdivision (a), the third such violation within a 36-month period.

Appearances on appeal include appellant Alvin Klein, Robert Lippman, and Steven Lippman, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 16, 1984. Thereafter, the Department instituted an accusation against appellant charging the sale of beer to Younessi. An administrative hearing was held on April 16, 1998, [2] at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained.

The transaction in question involved the purchase by Aaronmichael Younessi, a minor, of a 12-pack of Coors beer. The transaction was witnessed by two Department investigators, Edward Yee and Eric Hirata, who were in the store.

Younessi testified that he went to the rear of the store, grabbed the 12-pack of Coors, and stood in line at the register. He placed the beer on the counter, and pulled out his identification and money. Younessi testified he was asked for identification, and produced his California driver's license. When the clerk rang up the sale, Younessi, according to his testimony, did not have enough money, so went to his friend, who was waiting in the car, to get additional funds. He then returned to the store, paid for

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[2] That the administrative hearing occurred on an anniversary of the issuance of appellants' license appears to be nothing more than a coincidence.

the beer, left the store, and encountered the investigator. Younessi said he was asked if he had identification, and answered that he did. The identification he had was his California driver's license. He denied having any other identification.

On cross-examination, Younessi said he was accompanied to the store by a male friend who was also not 21. The friend remained in the car while Younessi went into the store. The two had been at a friend's house before going to get the beer. Younessi was not positive how much money he had with him, but believed he had $10.00. He could not remember the denomination of the bill or bills he had, but knew it was paper currency. The money he had was collected from his friend and the other two people at the friend's house. He had no money of his own when he went into the store. He insisted the identification he carried was his own, and denied having someone else's driver's license, or having false identification. Younessi acknowledged his awareness that it was unlawful to be in possession of false identification, or to use another person's identification. Younessi believed he had paid somewhere between $12.00 and $15.00 for the beer.[3] Younessi confirmed he had not been searched by the investigator when he was stopped after leaving the store, nor had his friend or the car his friend was in been searched.

According to the testimony of investigator Yee, his attention was drawn to Younessi by his youthful appearance. Yee testified that he observed Younessi in line at the cash register, holding Coors beer. He saw Younessi

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[3] The transaction was recorded on a security camera, and the cash register tape, which was visible on the recording, indicated a transaction total of $8.97. Appellant Alvin Klein testified that the price of beer for the past three years was $7.99, and, with tax asnd crv, the total would have been $8.97.

place the beer on the counter, produce identification for the clerk, engage in conversation with him, leave the store without the bber, and then return momentarily, hand the clerk some money, and complete the transaction. At this point, Yee left the store, waited for Younessi to come outside, and apprehended him when he did so. Yee identified himself as an investigator, and asked Younessi his age, and for identification. Younessi told Yee he was 19, and produced a valie California driver's license which confirmed that he was, in fact, 19. Yee testified that he informed Hirata of the situation, and then reentered the store with Younessi and confronted the clerk. According to Yee, when the clerk was shown Younessi's driver's license, he said "something to the effect 'It was busy. I must have misread the birth date.'" Yee then left Younessi in the custody of Hirata and Los Angeles police officer Anthony Posada, a member of the task force Yee was working with on the night in question, and who, with other officers, had been summoned to the scene, while he reentered the store to cite the clerk. He did not search Younessi.

On cross-examination, Yee estimated the length of time Younessi remained outside the store before returning to complete the transaction as approximately 30 seconds to one minute. He said that when Younessi handed him his driver's license, it was not in Younessi's wallet. He testified that he asked Younessi if he had any false identification with him, and was told no.

Officer Posada testified that he also asked Younessi if he had any fake identification, and was told no. Officer Posada also testified he gave Younessi a pat-down search, and found keys, a wallet, and a pill box. He had Younessi open his wallet and display it, but did not himself take the wallet in his hands. Posada explained to the Administrative Law Judge (ALJ) that when he conducted his pat-down search, investigator Yee was inside the store and investigator Hirata was outside. Posada said he saw

cards in Younessi's wallet with his name on them, and also saw several bills in the money section of the wallet, but did not see any false identification.

Investigator Hirata testified that he saw Officer Posada conduct the pat-down search, but he himself did not search Younessi.

Jose Ballesteros, the clerk, testified that he has been a cashier at the premises for eight years. He was aware that a minor's driver's license has a red stripe, and the minor's photo would be on the right, whereas an adult's photo is on the left. Ballesteros did not recall whether he was shown a driver's license or an identification, but insisted it showed an age over 21, and denied that it had a red stripe. He specifically denied having beens shown the driver's license exhibited to him by the investigator immediately after the sale. Ballesteros claimed that the identification he was shown contained a birth date of 1970 [(RT page 153-154].

Appellant Klein testified that he was called to the store after the sale. He thought it difficult to believe Ballesteros would have sold to a minor. He said Ballesteros was the most trustworthy clerk appellants employed, and the most vigilant in checking for proper proof of age.

Following the conclusion of the hearing, the ALJ issued a proposed decision which rejected appellants' reliance upon the defense set forth in Business and Professions Code section 25660, i.e., good faith reliance upon false identification.

Appellants have filed a timely notice of appeal, and raise the following issues: (1) the Department's failure to comply with lawfully issued subpoenas prejudiced appellants' ability to defend against the charge of the accusation; and (2) the Department erred in rejecting appellants defense based upon their claim that the clerk reasonably relied upon false identification.

DISCUSSION

I

Appellants contend they were prejudiced in their defense against the charges of the accusation by the Department's failure and refusal to comply with subpoenas issued by appellants. In view of our holding on the merits, we do not need to address this issue.

II

Appellants claim they are entitled to the defense provided by Business and Professions Code section 25660, which provides that reliance upon bona fide evidence of identification, as there defined, shall be a defense to any criminal prosecution or proceeding for license suspension or revocation. It is appellants' contention that Younessi presented a false identification to their clerk, and that his purpose in exiting the store mid-transaction was to rd himself of the false identification rather than obtain additional funds to pay for the beer.

Appellants point to Younessi's testimony that he believed he had $10.00, and that he believed the beer cost between $12.00 and $15.00, while the cash register tape showed the beer cost only $8.97. Appellants argue that this shows Younessi must have had some other reason for leaving the store when he did, and since it could not have involved money, the only other logical reason would have been to rid himself of false identification. Appellants stress the failure of the investigators and police officer to conduct any meaningful search of Younessi which might have discovered the identification the clerk claimed he was shown.

The Department argues that the isue is one of credibility - that the Administrative Law Judge simply chose to believe the minor's testimony that he displayed his valid California driver's license, and never possessed false identification. We think more is involved.

Appellants are able to point to a number of factors from which one could reasonably believe their clerk's claim that he was shown false identification. Although the conclusion does not follow ineluctably, that his testimony must be believed and that of the minor disbelieved, and although credibility is ordinarily an issue for the trier of fact, the factors set out in appellants' brief are highly persuasive.

The Department reads the decision as if the ALJ actually concluded that Younessi presented his valid California driver's license. We do not think it follows necessarily that the ALJ so concluded. It appears to us that he was unable or unwilling to make such a definitive finding. It is as if the ALJ is saying "I do not know if false identification was shown, but if it was, a reasonable person would not have relied upon it." This is not the sort of finding that will support an order of revocation.

We do not know what the result of a careful and properly conducted search and investigation would have disclosed. We think, however, that it rises to the level of unfairness to deprive these licensees of the right to sell alcoholic beverages where, as here, there was such an ineffective search for evidence that might have vindicated them, and the evidence sufficiently questionable that the

ALJ was either unable or unwilling to make a definitive finding on a critical issue.

ORDER

The decision of the Department is reversed.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:	)	FILE: 20-141764
	)	REG: 97041857
Alvin Klein, Robert Lippman & Steven Lippman Village Expressmart 10974 Le Conte Avenue Los Angeles, CA 90024	)	LICENSE TYPE: 20
	)	PAGES: 195
	)	REPORTER: Caroline Jetter Barney/Ungermann
Respondents,	)	
	)	PROPOSED DECISION
Off-sale Beer & Wine License.	)	

This matter was heard by Jeffrey Fine, Administrative Law Judge of the Department of Alcoholic Beverage Control, Administrative Hearing Office, at Los Angeles, California, on April 16, 1998 at 9:30 a.m.

Matthew Ainley, Staff Counsel, represented complainant Department of Alcoholic Beverage Control.

Ralph Saltsman, Attorney at law, represented Respondents Alvin Klein, Robert Lippman and Steven Lippman.

Evidence was received and the matter was argued and submittede. The Administrative Law Judge now finds, determines and orders as follows:

FINDINGS OF FACT

I

On October 20, 1997, District Administrator Edward Mimiage signed an accusation against respondents alleging a violation of Business and Professions Code Section 25658. Respondents timely requested a hearing an the Department of Alcoholic Beverage Control (Department) served on Respondents a Notice of Hearing on the Accusation.

II

Respondents own and operate a premises which sells beer and wine. On or about October 4, 1997, at about 11:45 p.m., Respondents, through their agent, Jose Ballesteros, sold beer to Aaronmichael Younessiu, who was at that time a minor.

III

Two Department investigators, (Yee and Hirata) were in Respondents' store on the night of October 4, 1997, and early morning of october 5, 1997. Investigator Yee observed Younessi take a 12-pack of Coors beer from the refrigerated section in the rear, wait in line and show identification to the clerk. Yee observed the clerk examine the proffered identification and actually hold it. He then saw the minor leave the 12-pack on the counter and exit the store. The minor returned within a minute or so and waited for the clerk to finish with another customer, then he handed some bills to the clerk. Younessi left the store with the 12-pack. Yee was about 5 feet from Younessi and 7 feet from the clerk.

IV

Investigator Yee exited the store just before the minor left with the beer and apprehended the minor outside the store. Hirata then left the store. Yee identified himself, asked the minor his age and asked to look at his identification. He was shown the minor's true California Driver License which had a red stripe, picture on the right hand side and showed Younessi's true date of birth, which is July 30, 1978. Yee called other officers to the scene.

V

Investigator Posada arrived and questioned the minor about weapons and identification. He asked permission to search the minor and was given permission. He patted down the minor and had the mionr show him his wallet but Posada did not tough the wallet himself. In the wallet he saw some cards with the minor's name on them. After the pat down search was completed, Yee entered the store with the minor and informed the clerk that he sold beer to a minor. The clerk was cited as was the minor. At the time, the clerk stated that he must have made a mistake and he was busy.

VI

Younessi volunteered to buy the beer for himself and some friends. Younessi entered the premises and took a 12-pack of beer. He showed the clerk his ID. He did not have enough money, so he briefly left the store, leaving the 12-pack on the counter, got more money from the friend who had driven him to the store, re-entered the store, waited until the clerk finished with another customer, purchased the beer, left the store and was apprehended outside the store.

VII

Neither investigator Yee or Hirata observed Younessi after he left the store to get more money but observed him re-enter the store.

VIII

Younessi denies he showed the clerk a false ID.

IX

The clerk does not remember the person he sold to but does remember the ID. According to the clerk, the ID did not have a red stripe, the photo was on the left side, the license had not expired and the date of birth was 1970.

X

On the night of October 4, 1997, the minor looked substantially the same as on the date of the hearing. The minor does not look 27 (his age if he was born in 1970). Younessi looks his age. The clerk was busy. The clerk did not carefully look at the minor.

XI

The investigators did not ask Younessi how he got to the store and did not search the friend or the friend's car.

XII

Respondents have 2 prior violations of Section 25658 in 1990, and two in 1996.

DETERMINATION OF ISSUES

I

Article XX, Section 22 of the California Constitution and California Business and Professions Code Section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

II

California Business and Professions Code section 25658(a) provides that every person who sells, furnishes, or gives any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

III

A licensee is vicariously responsible for the unlawful on-premises acts of its employees. Such vicarious responsibility is well settled by case law. Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal. App. 2d 172, 17 Cal. Rptr. 315; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal. App. 2d, 2 Cal. Rptr. 629.

IV

Business and Professions Code section 25660 defines bona fide evidence of majority and identity and provides that the licensee or his agent "demanded and was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon."

V

The licensee has the burden of proving the defense that evidence of identity was demanded, shown and acted upon as prescribed by the provisions of Business and Professions Code section 25660. Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control 261 (1968) Cal.App. 181; 67 Cal. Rptr. 734 Raab v. Department of Alcoholic Beverage Control (1960) 177 Cal. App. 2d 333, 2 Cal. Rptr. 26.

VI

In Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 281 Cal. App. 2d; 67 Cal. Rptr. 734 the court endorsed three tests by which to measure conduct in determining whether there has been compliance with provisions of Section 25660. First, the licensee who makes a diligent inspection of the documentary evidence of majority and identity offered by the customer at or about the time of the sale is entitled to rely upon its apparent genuineness. Second, a licensee must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. Third, a licensee must make the inspection of the documentary evidence and his appraisal of the physical appearance of the customer prior to the sale.

VII

Although Respondents' clerk sold beer to a minor, they argue that they have a defense under Business and Professions Code section 25660.

Respondents' defense is based on the following: The clerk is more credible than the minor, the minor "volunteered" to buy the beer, implying that he had a false ID, the minor actually had enough money to purchase the beer but was nervous and exited the store to get rid of the ID. The investigatoirs lost sight of the minor when he left the store.

While these facts and inferences support the Respondents' contention of a false ID, other facts and inferences do not. The minor denies having a false ID. It is not shown that the minor left the store to get rid of the ID since it was not established how much money the minor had when he entered the store. If the minor was nervous, it is questionable that he would return to the store after first leaving without the beer. No false ID was found. When confronted, the clerk did not state he was shown a false ID but that he was busy and made a mistake.

Even if one accepts that the minor presented a false ID, one of the tests to establish a defense is that the licensee must make an appraisal of the person presenting the document and exercise the caution which a reasonable prudent person similarly situated would exercise. The Respondents' stated policy is that if there is any question, the sale should not be made. When confronted with selling to a minor, the cloerk did not say that he was presented with a false ID but rather something to the effect that he was busy and made a mistake misread the ID. The minor does not look 27 and looks his age. other than that the minor was dressed differently (the clerk had observed the minor the day of the hearing), the clerk could not explain why the minor looked different the night of the purchase than the day of the hearing. Therefore, it is found that the clerk did not act prudently in appraising the physical

appearance of the minor even though he states he did look at the minor. It is found that he hardly looked at all but was in fact busy and concentrated on the ID, not the person in front of him. In selling to Younessi, the Respondents violated Section 25658(a).

Cause for suspension or revocation of the license under Article XX, Section 22 of the California Constitution and Business and Professions Code section 24200(a) for a violation of Business and Professions Code section 25658(a).

Penalty Copnsiderations:

The Department recommends that the Respondents' license be revoked. That recommendation is premised by two violations of Business and Professions Code Section 25658 in 1996. Business and Professions Code Section 25658.1(b) provides that the Department may revoke a license for a third violation of Business and Professions Code section 25658 that occurs within any 36 month period.

As discussed in paragraph 7 of the Determination of Issues, Respondent contends that the minor showed a false ID and also suggests that the minor has a motive in denying that he presented a false ID because that is itself a misdemeanor and could lead to legal problems for himself and his friends. While the Department has not dispelled all possible doubt on this issue the Respondent did not act reasonably in selling the beer to the obviously youthful looking minor and therefore cannot rely on Business and Professions Code section 25660. Speculation that a false ID

may have been presented does not itself amount to mitigation.

ORDER

Respondents' license is revoked.

Dated: 5-8-98

Jeffrey Fine
Administrative Law Judge